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The Double-Edged Sword of Academic Freedom: Cutting the Scales of Justice in Title VII Litigation

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THE DOUBLE-EDGED SWORD OF ACADEMIC FREEDOM: CUTTING THE SCALES OF JUSTICE IN TITLE VII LITIGATION

Prior to 1972, academic institutions enjoyed immunity from Title VII of the 1964 Civil Rights Act.[1] The 1972 amendments to Title VII removed the statutory exemption. Academic institutions, however, continue to enjoy a *de facto* immunity predicated upon the doctrine of academic freedom.

Few contend that Congress lacks the power to apply Title VII to academic institutions.[2] The subtle impact of academic freedom, however, invidiously deprives Congress of its power. The plaintiff in an academic employment discrimination suit, like any plaintiff, bears the ultimate burden of proof.[3] Yet courts under the rubric of academic freedom erect an array of barriers to the plaintiff's ability to prove her case.

To assert that academic freedom confers no license to discriminate misstates the issue.[4] The issue, often expressed as a constitutional proposition,[5] is, in reality, a matter of systematized analysis of complex fact

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1. Congress initially exempted academic institutions from coverage by Title VII of the 1964 Civil Rights Act with respect to their professional employees under the following provision:

> [t]his subchapter shall not apply . . . to an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution.

Civil Rights Act of 1964, § 702 *as amended by* 42 U.S.C. § 2000e-1.

2. The applicable prohibitions are as follows:

It shall be an unlawful employment practice for an employer

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a). For full text of Title VII see 42 U.S.C. § 2000e *et seq.* *See also* Young, *Sex Discrimination in Higher Education*, 5 CIV. LIB. REV. 41, 41 (No.2, 1978) [hereinafter "*Sex Discrimination*"] ("Congress issued a strong mandate that discrimination be eliminated from educational institutions"); and Cooper, *Title VII in the Academy: Barriers to Equality for Faculty Women*, 16 U.C. DAV. L. REV. 975, 979 (1983) [hereinafter "*Barriers*"] ("Title VII has erected powerful challenges to traditional employment practices").

3. *E.g.*, Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1980) (plaintiff in a disparate treatment case retains the ultimate burden of proof).

4. *See* Powell v. Syracuse University, 580 F.2d 1150, 1154 (2nd Cir. 1978) (academic freedom does not include the freedom to discriminate).

5. *See* Note, *Academic Freedom and Federal Regulation of University Hiring*, 92 HARV. L.

patterns.

Courts can and should balance the competing interests of Title VII plaintiffs and academic institutions. This Note argues that the current judicial approach to academic employment discrimination imposes unreasonable burdens upon the plaintiff. The Note also argues, however, that courts should not tip the scales too far in the opposite direction and completely disregard legitimate academic concerns.

Part I explores the doctrine of academic freedom and some of the unique features of the academic selection process. Part II introduces the traditional disparate treatment approach and its application to academic institutions. Part III focuses on a unique aspect of the problem—disclosure of traditionally confidential peer review materials. Parts IV and V of this Note offer a method for analyzing academic Title VII claims, which endeavors to strike a more equitable balance between plaintiffs and academic institutions.

I. THE FREEDOM TO DECIDE WHO MAY TEACH

The Supreme Court has never precisely held that the first amendment encompasses academic freedom.[6] Colleges and universities, however, serve a unique and important role in our society. An approach that ignores the policies behind academic freedom in favor of Title VII concerns serves no one's best interests. Consequently, access to the inner sanctum of education's "ivory towers" becomes meaningless if the quality of higher education suffers in the process.

REV. 879 (1979) [hereinafter "*Academic Freedom*"] (arguing that academic freedom is constitutionally protected) and Tepker, *Title VII, Equal Employment Opportunity, and Academic Autonomy: Toward a Principled Deference*, 16 U. C. DAV. L. REV. 1047 (1983) [hereinafter "*Principled Deference*"] (advocating a more policy based approach in favor of judicial deference to academic decisionmaking); *but see* Stacy and Holland, *Legal and Statistical Problems in Litigating Sex Discrimination Claims in Higher Education*, 11 J. of C. & U. L. 107 (1984) [hereinafter "*Statistical Problems*"] and Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 947 (1982) [hereinafter "*Jobs in High Places*"]. Each of the last two articles advocates application of the more rigorous disparate impact test to academic employment discrimination suits. Courts have consistently applied the disparate treatment test, however.

6. *Contra*, Note, *Academic Freedom*, *supra* note 5 at 881. The author contends that the Supreme Court elevated academic freedom to first amendment status in *Sweezy v. New Hampshire*. The logic of this assertion, drawn largely from dicta, is fundamentally flawed. The court in *Sweezy* focused on vagueness and the deprivation of individual rights within an academic context. *See infra* notes 7-14 and accompanying text.

A. From Individual Freedom to Institutional Autonomy

In *Sweezy v. New Hampshire*, Justice Frankfurter stated that academic freedom permits an educational institution to "determine for itself on academic grounds who may teach, what shall be taught, how it shall be taught, and who may be admitted to study."[7] *Sweezy*[8] and other early decisions relating to academic freedom,[9] however, dealt primarily with government efforts to influence either curriculum or the professor's politics.[10] The Court in these cases refrained from holding that all government interference with academia violated the first amendment. Instead, the Court relied upon the hazy contours of the anti-communist investigations,[11] and held that the government action violated the vagueness doctrine.[12] The Court expressed "special concern"[13] about government actions that could chill exercises of first amendment rights in an academic setting.[14] These decisions suggested that the Court would carefully guard against government suppression of *individual* rights within academia.

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7. 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring). It is ironic that this statement, which Frankfurter took from a conference of South African educators, *opposed* to racial discrimination, should become the foundation for arguments against applying equal employment laws to academia.

8. 354 U.S. 234 (1957).

9. *See* Keyishian v. Bd. of Regents of Univ. of New York, 385 U.S. 589 (1967); Shelton v. Tucker, 364 U.S. 479 (1960); and Weiman v. Updegraff, 344 U.S. 183 (1952). These cases arose during the McCarthy era and dealt with government anti-communist activities directed against educators.

10. In *Sweezy*, the state made direct inquiries into the contents of Sweezy's lectures and his political affiliations. *Sweezy*, 354 U.S. at 249-50. *Keyishian* contained the same focus on government actions aimed directly at influencing the philosophical content of education. The Court stated, "the First Amendment . . . does not tolerate laws that cast a pall of orthodoxy over the classroom." *Keyishian*, 385 U.S. at 603. As these cases suggest, it is the nature of the government's action rather than the academic context that raises the first amendment concerns.

11. *Sweezy*, 354 U.S. at 254-55. The Court specifically held that the overbroad state investigation violated Sweezy's fourteenth amendment due process rights. *Id.*

12. *Id. See also Weiman*, 344 U.S. 183 (test oaths particularly prone to challenges for overbreadth and vagueness).

13. *Keynishian*, 385 U.S. at 603.

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us . . . [t]hat freedom is a special concern of the First Amendment . . .
> *Id.*

14. *Shelton*, 364 U.S. at 487 ("The vigilant protection of constitutional freedom is nowhere more vital than in the community of American schools."). Again the court implied that the first amendment issues arise independent of academic freedom. The academic context served to heighten the Court's concern, because of education's close nexus to the "marketplace of ideas." These cases did not involve any institutional claims to academic freedom.

Some lower courts have suggested that traditional concepts of academic freedom require more, rather than less, vigorous enforcement of Title VII.[15] In *In re Dinnan*[16] the Fifth Circuit Court of Appeals stated that employment discrimination provided a more effective means of suppressing individual expression than government enforcement of Title VII.[17] This argument comports with the tenure system's basic philosophy, which seeks to insulate individual academicians from institutional pressures.[18]

Academic institutions, on the other hand, have singled out Frankfurter's dictum in *Sweezy*[19] and argued for institutional autonomy. According to universities, faculty selection is an essential component in controlling the "idea" content of education.[20] Their argument has two prongs. First, courts lack the expertise necessary to evaluate academic

15. *E.g.*, E.E.O.C v. Univ. of Notre Dame du lac, 715 F.2d 331, 337 (7th Cir. 1983) (unlawful tenure decisions frustrate the goal of academic excellence); and Gray v. Bd. of Higher Educ., City of New York, 692 F.2d 901, 909 (2d Cir. 1982) (academic freedom is illusory when it serves as a veil for censorship rather than a protection against censorious practices).

16. 661 F.2d 426 (5th Cir. 1981).

17. *Id.* at 430. Distinguishing *Sweezy* and the related line of cases, *supra* notes 9-10, the court said:

> [I]n all of those cases there was an *attempt to suppress ideas by the government* .... [T]hese issues are not presented in the instant case. Here a *private* plaintiff is attempting to enforce her [rights]. *Id.* (emphasis by the court).

The court also stated:

> Though we recognize the importance of academic freedom, we must also recognize its limits. The public policy of the United States prohibits discrimination; Professor Dinnan and the University of Georgia are not above that policy. *Id.* at 431.

18. According to the American Association of University Professors (A.A.U.P.):

> Tenure is a means to certain ends, specifically:
> (1) Freedom of teaching and research and of extramural activities and (2) a sufficient degree of economic security to make the profession attractive to men and women of ability. Freedom and economic security, and hence, tenure are indispensable to the success of an institution in fulfilling its obligations to its students and to society. *A.A.U.P. Policy Documents & Reports*, pg. 3 (1984).

19. *Supra* note 7.

20. *See* Hill and Hill, *Employment Discrimination: A Rollback of Confidentiality in University Tenure Procedures?*, 22 AM. BUS. L. J. 209, 210-12 (1984) [hereinafter "*Rollback of Confidentiality*"] (there is a close relationship between academic freedom and the peer review process). The Seventh Circuit raised a similar theme in *University of Notre Dame*:

> It is clear that the peer review process is essential to the very lifeblood and heart of academic excellence ... The process of peer evaluation [is] the best and most reliable method of promoting academic freedom and excellence .... 715 F.2d at 336.

See also Lieberman v. Gant, 630 F.2d 60, 67-68 (2d Cir. 1980) (courts should not "second-guess" scholarly opinions); Faro v. New York Univ., 502 F.2d 1150, 1157 (2d Cir. 1974) ("education and faculty appointments at a University level are [ill]-suited for federal court supervision"); and Johnson v. Univ. of Pittsburgh, 435 F. Supp. 1328, 1353 (W.D. Pa. 1977) (the court is not a "Super Tenure Committee").

credentials and determine who is qualified for tenure or promotion.[21] Judicial interference thus could undermine the quality of higher education.[22] Second, Title VII could become a pretext for content-motivated interference with academia.

Although these arguments are somewhat inapposite to the first amendment's primary concern for individual expression, they are not entirely without merit. The Supreme Court has, in other areas of constitutional law, bridged the gap from individual privacy to autonomy.[23] Beyond this, academic institutional autonomy is consistent with the tradition of minimizing government intervention in the mediums of expression.[24] Academic freedom presents a double-edged sword that requires courts to exercise caution and precision when confronted with academic employment discrimination suits.[25]

B. The "On Academic Grounds" Requirement

In *Rollins v. Farris*[26] a federal district court suggested that a university's right to autonomous decisionmaking would stop where its discrimi-

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21. *See* authorities cited *supra* note 20. Other courts have refrained from adopting an explicit deference to university decisionmakers, but have nonetheless expressed reluctance to question academic judgments. *See e.g.*, Namenwirth v. Board of Regents of the Univ. of Wis. Sys., 769 F.2d 1235, 1242-43 (7th Cir. 1985) ("to allow the decisionmaker also to act as the source of judgments would ordinarily defeat the purpose of the discrimination laws; [b]ut in the case of tenure decisions we see no alternative"); Zahorik v. Cornell Univ., 729 F.2d 85, 93 (2d Cir. 1984) (courts cannot hope to master the field of academics sufficiently enough to review the merits of tenure decisions); and Powell v. Syracuse Univ., 580 F.2d 1150, 1157 (2d Cir. 1978) (judicial reluctance to intervene motivated by recognition of academicians' superior expertise).

22. Tepker, *Principled Deference, supra* note 5 at 1081 (universities must compete with one another in the "intellectual marketplace" for faculty members and students). *But cf.* Young, *Sex Discrimination, supra* note 2 at 41 (the most prestigious universities often have the fewest women faculty members).

23. *See* Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); and Griswold v. Connecticut, 381 U.S. 479 (1965).

24. *See Sweezy*, 354 U.S. at 262 (Frankfurter, J., concurring) ("[t]hese pages need not be burdened with proof . . . of the dependence of a free society on free universities").

25. The unique position of academia in the development of ideas raises first amendment concerns and makes government intervention suspect. The government has an obligation, however, to insure that benefits of higher education are "freely" available to all. As the Fifth Circuit said:

> [I]f the concept of academic freedom were extended as far as the [university] argues, it would rapidly become a double-edged sword threatening the very core of the values it now protects. *Dinnan*, 661 F.2d at 426.

26. 39 F.E.P. 1102, 1105 (E.D. Ark. 1985). The court in *Rollins* quoted Frankfurter's classic description of academic freedom from *Sweezy, supra* note 7. The *Rollins* Court emphasized the phrase *on academic grounds* to delineate what it perceived as the limit of academic autonomy. 39 F.E.P. at 1105.

nation had begun. The difficulty lies, however, in determining when discrimination has been a motivating factor in a university's decision. A court cannot always determine the true basis for a particular decision with accuracy because the academic selection process is extremely complex.[27] Most tenure and promotion decisions involve peer evaluation and committee deliberations. Vague criteria and subjective, decentralized decisionmaking inhere in this process.[28]

The tenure system is closely intertwined with academic freedom and the maintenance of quality in higher education.[29] A university could not easily list the ingredients necessary for good teaching or scholarship. Additionally, the needs of a particular institution change over time.[30] A candidate must not merely pass scholastic muster, she must also fulfill a need arising at the time of her candidacy.[31] Universities must, therefore, rely on a selection process that substantially involves subjective decisions.

Courts have been extremely suspicious of subjective employment decisions in other contexts, because subjectivity allows greater latitude for arbitrary action. The legitimacy of the academic selection process itself,

27. *See Zahorik*, 729 F.2d at 92-93. Prof. Tepker stated:

> These intangible qualities [academic qualifications] can only be discerned and judged on the basis of subjective criteria, and even then, not without debate or controversy. An educator must deal with resistance from the advocates of conventional ideas and from skeptical colleagues. The educator must contend with the subjective judgments, intellectual criticism, and occasionally bitter opposition of other academicians on issues of controversy. Persuasiveness, teaching skill, and academic merit are in the eye of the beholder. *Principled Deference, supra* note 5 at 1081.

28. The unique features of the academic selection process make judicial review more difficult. First, the process is decentralized. Several different individuals and committees collaborate on each decision. Discrimination by one or more actors may or may not affect the final outcome. Second, the decisionmakers employ criteria covering a broad range of intangible qualities, for example, teaching, scholarship, and service. Third, the standards are non-specific and subjective. Additionally, academic employment is often non-competitive. Candidates compete against a "standard" rather than against one another for specific slots.

29. *See supra* notes 20 & 21. The court in *Johnson* stated:

> [T]enure is . . . a distinctive honor . . . not to be accorded to all assistant professors. Such decision [awarding tenure] *by its very nature* . . . must be mde by the faculty, the administration, and the trustees of the university. 435 F. Supp. at 1353.

30. *See* Banerjee v. Board of Trustees of Smith College, 648 F.2d 61 (1st Cir. 1981). The plaintiff contended that the college had tested his qualifications against a higher standard than that used in prior decisions. According to the court, "this was because the times were favorable for doing so, and not in order to discriminate against the plaintiff." *Id.* at 66.

31. *See* Smith v. University of N.C., 632 F.2d 316, 343 (4th Cir. 1980) (plaintiff denied tenure because she was a "specialist" and school needed a "generalist").

however, is not subject to serious challenge.[32] Courts recognize the relationship between the process and the school's interest in selecting a quality faculty.

The legitimacy of the peer review system has important consequences for the plaintiff. First, legitimacy insulates the academic selection process from *facial* challange under the disparate impact branch of Title VII jurisprudence.[33] Therefore, the academic plaintiff must proceed under the more difficult disparate treatment theory, challenging the process *as applied* to her. Second (as discussed more fully in Part II), the subjective nature of the process makes it more difficult for a plaintiff to prove her case.

II. THE NECESSITY AND DIFFICULTY OF PROVING INTENT

Unlike the plaintiff in a disparate impact suit, the plaintiff in a disparate treatment suit must prove intent to discriminate.[34] In a disparate impact suit, if the plaintiff shows that a particular selection device has a disproportionate effect on minority opportunity, the burden of persuasion shifts to the defendant, and the employer must show that the challenged practice serves a necessary business purpose.[35] In a disparate treatment suit, however, proof of statistical disparity imposes only a production burden on the defendant.[36]

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32. *E.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) and Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972).

The court in Johnson v. University of Pittsburgh, 435 F. Supp. 1328 (W.D. Pa. 1977) stated:

> [U]nder *Rowe* (citation omitted) in a case where there are no criteria for promotion except the unfeathered recommendation of a foreman this can become a ready mechanism to conceal discrimination. In the instant case however the criteria contained in the faculty handbook were as definite as possible considering the elusive nature of professional qualifications and teaching ability. *Id.* at 1357.

Contra, Bartholet, *Jobs in High Places, supra* note 5 (tradition and legitimacy are not synonymous with necessity—the usual standard governing whether subjective decisionmaking is permissible).

33. *Cf.* Griggs v. Duke Power Co., 401 U.S. 424 (1971) (disparate impact operates to invalidate an employment practice having an adverse impact on minority opportunity, regardless of intent).

34. Proof of intent is actually the rule in equal protection cases, though the Court has recognized a few limited exceptions. *See, e.g.*, Rome v. United States, 446 U.S. 217 (1980) (Congress may prohibit voting practices having a disparate impact without regard to intent) and Keyes v. School Dist. No. 1, 413 U.S. 189, 217 (1972) (Powell, J., concurring) (advocating explicit abandonment of intent requirement in school desegregation). In *Griggs* the Court held that "practices, procedures, or tests neutral on their face and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." 401 U.S. at 430.

35. *Griggs*, 401 U.S. 424.

36. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 256 (1980); Board of Trustees

A. The Necessity

In *McDonnell Douglas Corp. v. Green*[37] the Supreme Court prescribed the allocation of the burden of proof in a disparate treatment suit.[38] Because direct proof of intent is usually unavailable, the plaintiff must rely on circumstantial evidence and the totality of facts. Under the three-step *McDonnell Douglas* approach, the plaintiff bears the initial burden of establishing a prima facie case of discrimination, usually by showing that members of a non-protected class received the position for which plaintiff applied.[39] The evidence raises an inference of discrimination if it indicates that the plaintiff was similarly qualified. The burden then shifts to the employer to articulate legitimate, non-discriminatory reasons for his decision.[40]

Finally, the plaintiff must prove that the employer's articulated reasons are a mere pretext for discrimination.[41] During this phase, the

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of Keene State College v. Sweeney (Sweeney I), 439 U.S. 24 (1978); and Furnco Contr. Co. v. Waters, 438 U.S. 567, 576-78 (1978).

37. 411 U.S. 792 (1973).

38. Justice Rehnquist later described this approach as follows:

> The method suggested in *McDonnell Douglas* for pursuing this inquiry, however, was never intended to be rigid, mechanical, or ritualistic. Rather it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination.

Furnco, 438 U.S. at 577.

39. The Court stated:

> This [establishing a prima facie case] may be done by showing (i) that [plaintiff] belongs to a [protected] minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of the plaintiff's qualifications. 411 U.S. at 802.

40. *See Burdine*, 450 U.S. at 254-55 (defendant satisfies production by "rais[ing] a genuine issue of fact as to whether [he] discriminated against the plaintiff"); *Sweeney I*, 439 U.S. 24 (merely *articulating* legitimate, non-discriminatory reasons sufficiently answers prima facie case); and *Furnco*, 438 U.S. at 577 (employer dispels adverse inferences of prima facie case by *mere articulation* of legitimate, non-discriminatory reasons for his actions). (emphasis added). In *Burdine*, the Court offered the following explanation for imposing only a burden of articulation:

> Placing [the] burden of production on the defendant . . . serves simultaneously to meet the plaintiff's prima facie case by presenting legitimate reasons for the action and to frame the factual issues with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext. 450 U.S. at 256.

The Court then provided three reasons why this would not hinder the plaintiff:

> (1) The defendant has an obligation to state clear and reasonably specific reasons;
> (2) Despite the lack of a formal persuasion burden the defendant has an incentive to convince the court that his conduct was lawful; and
> (3) Liberal rules of discovery assist the plaintiff in carrying the ultimate burden.

Id. at 258.

41. *McDonnell Douglas*, 411 U.S. at 804. Specifically the Court stated:

plaintiff can address her arguments to specific factual issues. Plaintiffs depend on three methods to prove pretext: (1) challenges to the factual basis of the employment decision;[42] (2) comparisions between the plaintiff and those similarly situated;[43] and (3) introduction of direct evidence of discrimination.[44] This approach rests on the premise that unexplained arbitrary actions raise an inference of impermissible discrimination.[45] Thus, by attacking the factual or logical credibility of the defendant's reasons, the plaintiff attempts to leave them "unexplained" in the eyes of the court.[46]

The Supreme Court tacitly appoved application of this traditional formula to academic Title VII suits in *Sweeny v. Keene State College, (Sweeny I).*[47] Application of the formula has never been easy. Courts have erected *ad hoc* barriers that either impair a plaintiff's access to evidence or limit the inference drawn therefrom.[48] Furthermore, subjective

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> The plaintiff may also introduce evidence as to the employer's treatment of the plaintiff prior to the complained of act, and evidence of the employer's general policy and practices towards minority employment.

Id. at 804-05.

42. The plaintiff may introduce evidence that her qualifications are in fact different than as claimed by the employer, and that her actual qualifications meet the articulated criteria. For example, if the college requires a particular degree as a condition of employment, and claims that the plaintiff did not possess such degree, the plaintiff could prove pretext by showing that she actually had the requisite degree. *See* Sweeney v. Bd. of Trustees of Keene State College, (Sweeney II), 604 F.2d 106 (1st Cir. 1980).

43. Most agree that "comparison evidence"—proof that similarly situated individuals received differential treatment—is the most probative of discrimination. *See* Cooper, *Barriers, supra* note 2 at 991 ("The qualifications of the plaintiff and those treated more favorably, and the correct evaluation and application of those qualifications, are the essence of a disparate treatment case.").

44. Direct evidence includes the following: prior unfair treatment of plaintiff by the employer; prejudicial or biased statements attributable to decisionmakers; irregularities in the procedures used for reaching the challenged employment decision; and statistical disparities in faculty composition or a history of employment discrimination. This evidence, though highly probative of discriminatory animus, often provides no connection between improper intent and the complained of employment decision. The plaintiff must also show "that she has been the victim of intentional discrimination." *Burdine*, 450 U.S. at 256. *But see* Kunda v. Myhlenberg College, 621 F.2d 532 (3d Cir. 1980) (failure to advise plaintiff concerning degree requirement is prior unfair treatment showing pretext).

45. "A prima facie case . . . raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors . . . ." *Furnco*, 438 U.S. at 577.

46. For explanations of the functional underpinnings of the *McDonnell Douglas* approach see *Burdine*, 450 U.S. 248, and *Furnco*, 438 U.S. 567.

47. 439 U.S. 24 (1978). The Court simply remanded per curiam for reconsideration in light of *Furnco*. In *Sweeney I*, the lower courts used language suggesting the imposition of a *persuasion* burden on the college during rebuttal. The Court has yet to address any other issue in academic Title VII litigation.

48. Some courts have limited the plaintiff's access to confidential peer review materials. *See*

evaluation itself provides a legally acceptable explanation for many seemingly arbitrary actions.[49]

B. The Difficulty

In early academic Title VII cases, courts explicitly refused to compare the qualifications of different candidates. For example, in *Lieberman v. Gant*, the Second Circuit Court of Appeals upheld the district court's exclusion of comparison evidence on the grounds that such inquiries exceeded judicial expertise.[50] The Court held that a plaintiff must show "demonstrably superior" qualifications as a prerequisite to the introduction of comparison evidence.[51] Because the essence of disparate treatment is the differential treatment of similarly situated individuals, comparison evidence is the most reliable means of proving pretext.[52] Thus, adherence to the *Lieberman*[53] holding would prevent all but the most highly qualified plaintiffs from proving intent.

The courts have abandoned this approach in recent cases. In *Namenwirth v. Board of Regents of the University of Wisconsin* the Seventh Circuit Court of Appeals explicitly rejected the defendant's suggestion that judicial comparisons were *per se* improper.[54] The court

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E.E.O.C. v. University of Notre Dame du lac, 715 F.2d 331 (7th Cir. 1983); Gray v. Board of Higher Educ., City of New York, 692 F.2d 901 (2nd Cir. 1982); Jepsen v. Florida Bd. of Regents, 610 F.2d 1379 (5th Cir. 1980); and Keyes v. Lenoir Ryne College, 552 F.2d 579 (4th Cir. 1977).

Other courts, acting under a self-imposed deference to academic decisionmaking, have limited the probative value of certain evidence. *See* Namenwirth v. Board of Regents of the Univ. of Wis. System, 769 F.2d 1235 (7th Cir. 1985); Zahorik v. Cornell Univ., 729 F.2d 85 (2nd Cir. 1984); Banerjee v. Board of Trustees of Smith College, 648 F.2d 61 (1st Cir. 1981); Smith v. University of N.C., 632 F.2d 316 (4th Cir. 1980); Lieberman v. Gant, 630 F.2d 60 (2nd Cir. 1980); Farlow v. University of N.C., 624 F. Supp. 434 (M.D.N.C. 1985); Peters v. Middlebury College, 409 F. Supp. 857 (D. Vt. 1976).

49. Tenure is traditionally awarded strictly on the basis of academic judgments. Beyond this, courts have no independent standard for determining if a plaintiff is qualified. *See Namenwirth*, 769 F.2d at 1243 (lack of identifiable benchmark complicates the court's task).

50. 630 F.2d 60, 63 (2nd Cir. 1980) (lower court did not err by refusing to engage in "tired-eyed" study of a plaintiff's proferred comparison evidence).

51. *Id.* at 67-68.

52. *See McDonnell Douglas*, 411 U.S. at 804 (evidence that employer retained members of non-protected group, who had qualifications similar to plaintiff's is "particularly probative").

53. 630 F.2d 60 (2d Cir. 1980).

54. 769 F.2d 1235 (7th Cir. 1985). The court held:

> The state . . . has argued . . . that comparisons are out of place in tenure decisions. We disagree. Comparisons may be more difficult in the case of professional and academic employment decisions, but they may be essential to a determination of discrimination; and where they are and where the evidence is available, they must be made.

Id. 1240-41.

conceded, however, that such comparisons were limited as a practical matter, because essentially, courts must compare the academic evaluations of the different candidates' qualifications rather than the qualifications themselves.[55] Courts refuse independently to reassess qualifications in academic situations. Under this presumption of evaluator accuracy, the opinions of the plaintiff's colleagues form the factual basis of any judicial comparison.

The presumption of accuracy poses several problems for a plaintiff. First, because peer evaluations are expressed in conclusory terms, a court cannot make detailed comparisons, or analyze candidate qualifications in depth. Second, the presumption of accuracy ignores the potential for discriminatory animus within the plaintiff's peer group. Finally, for all practical purposes, the presumption is irrebuttable.[56]

Namenwirth demonstrates this final flaw. As stated above, courts rarely question the sufficiency of the school's articulated explanation.[57] First, courts accept *any subtle difference* between candidates as a legitimate reason for differential treatment. Because universities rely on broadly based criteria, some differences will inevitably exist. In

55. *Id.* at 1243. The court stated that "[i]f we consider the department vote as an assessment of [plaintiff's] qualifications by experts in the field—and there is no doubt that it is that—then the University's denial of tenure is based on rather hard evidence that Namenwirth was not as well qualified as those who were granted tenure." *Namenwirth*, 769 F.2d at 1242. Other courts have referred to this as "deference to academic expertise" or "refusal to second-guess academic professionals." This Note prefers the term "presumption of evaluator accuracy."

56. *See Farlow*, 624 F. Supp. at 438 (the court was "particularly disturbed" by the sexist remarks of male colleagues but did not find for the plaintiff on the issue of pretext).

57. The court in *Namenwirth* literally threw up its hands, and concluded that there was no alternative to accepting academic evaluations as an accurate characterization of the plaintiff's qualifications. 769 F.2d at 1242-43. Other courts have used different characterizations in expressing their refusal to cross the same threshold. *See, e.g., Zahorik*, 729 F.2d at 93 (court cannot hope to resolve differences of scholarly opinion); *Lieberman*, 630 F.2d at 67-68 (court should refrain from "second-guess[ing]" scholarly opinions); *Johnson*, 435 F. Supp. at 1357 (the tenured faculty is in the best position to judge academic qualifications); *Peters*, 409 F. Supp. at 868-69 (denial of contract renewal based on professional judgments; a decision defendants may make without judicial interference); and Greene v. Board of Regents of Texas Tech. Univ., 335 F. Supp. 249, 250 (N.D. Tex. 1971), *aff'd*, 474 F.2d 594 (5th Cir. 1973) (courts reluctant to overrule the judgments of those possessing expertise in the field). Even statements facially supportive of vigorous Title VII enforcement contain qualifiers based on deference to academic expertise. *See, e.g., Powell*, 580 F.2d at 1153 (recognition of "relative institutional competencies"—as between colleges and courts—should not be extended to an anti-interventionist policy, immunizing academic instititutions from Title VII).

Powell marked a shift in judicial attitudes toward application of Title VII to universities. *Powell* repudiated, to some extent, an earlier Second Circuit decision, which advocated an explicit "hands-off" approach. *See* Faro v. New York Univ., 502 F.2d 1229, 1232 (2d Cir. 1974) (Congress might just as well enact a law providing for formal appeal of all academic employment decisions).

Namenwirth[58] and in *Farlow v. University of North Carolina*,[59] both plaintiffs attempted to show that a similarly qualified male candidate had been promoted, while plaintiff had not. In both cases the courts concluded that a tenure committee *could have* legitimately reached different conclusions.[60] A plaintiff cannot prove a disparate treatment claim if a court will not permit her to demonstrate that she was "similarly situated."

Unqualified acceptance of a school's articulated reasons permits a defendant to select the most legally defensible grounds as an explanation. Judicial decisions suffer from the lack of any benchmark standard by which to judge the fairness of a particular academic employment decision.[61] In a non-academic disparate treatment suit, the plaintiff first attempts to show that she was *qualified* for the position.[62] In the academic context, however, courts have no standard by which to measure a plaintiff's initial qualification for the position.[63]

As the above discussion indicates, after *Lieberman*, the courts' willingness to review academic employment decisions is still largely superficial.[64] The courts, still fearful of becoming super-tenure committees, refrain from reviewing the substance of a challenged academic decision. However, the plaintiff, under the *McDonnell Douglas* approach, has little chance of proving pretext in the absence of meaningful substantive review.[65] This *de facto* immunity, predicated upon limited juicial review, is as effective as a *de jure* exemption.

Additionally, the plaintiff faces other obstacles. Courts are reluctant

58. 769 F.2d 1235 (7th Cir. 1985).

59. 624 F. Supp. 434 (M.D.N.C. 1985).

60. *Namenwirth*, 769 F.2d 1235 and *Farlow*, 624 F. Supp. 434.

61. *Namenwirth*, 764 F.2d at 1243. The plaintiff's ability to challenge the factual assumptions underlying the university's decision (i.e.: faculty evaluations) is crucial. Proof of pretext turns on showing that the defendant's proferred reasons are unworthy of belief. *See Banerjee*, 648 F.2d at 64 ("As *Burdine* points out . . . the best way of proving a bad reason [is] to show the incorrectness of the claimed good one").

62. *McDonnell Douglas*, 411 U.S. at 802.

63. *Namenwirth*, 769 F.2d at 1243.

64. The fate of academic employees under Title VII has run the gambit of employer immunity, from a *de jure* legislative immunity, supra note 1, to a *de jure* judicial immunity, *supra* note 20, to a *de facto* judicial immunity, *supra* note 21. *See also supra* note 57. *Lieberman* and *Namenwirth* are illustrative. The difference between an explicit refusal to entertain comparison evidence, *Lieberman*, 630 F.2d at 63, and a willingness to entertain *limited* comparison, *Namenwirth*, 769 F.2d at 1243, is a difference in form not substance. This difference in attitude does not affect the outcome of the litigation.

65. *McDonnell Douglas*, 411 U.S. at 804 (comparison evidence usually most probative).

to draw inferences by comparing non-competitive[66] decisions, particularly when universities reach each decision at different times and under different circumstances.[67] Courts often require the plaintiff to limit comparisons to a particular department, refusing to entertain university-wide comparisons.[68] Most departments make relatively few decisions during the relevant time period.[69] Thus the available evidence may be insufficient to establish a significant pattern of discrimination.

C. Proving Pretext

The plaintiff in an academic Title VII suit must rely more heavily upon direct, rather than circumstantial, evidence of discrimination.[70] This evidence includes incidents of harassment, biased statements, and procedural irregularities. This type of evidence has two serious shortcomings. First, its availability is often fortuitous.[71] Educated people are particularly capable of reaching a discriminatory decision without outward manifestations of prejudice. Conversely, a few prejudicial remarks do not prove conclusively that the decision was tainted. This is particularly true in academia, where a number of decisionmakers have an input.[72] Second, this evidence is often less probative than other types, because the

66. *See Zahorik*, 729 F.2d at 92.

67. *See Banerjee*, 648 F.2d at 66 (tenure standards may vary according to school's needs at a particular time).

68. *See Zahorik*, 729 F.2d at 95 ("gross statistical evidence, with few figures relevant to plaintiff's department" was properly excluded).

69. *See* Stacy and Holland, *Statistical Problems, supra* note 5.

70. *See McDonnell Douglas*, 411 U.S. at 804-05 (other relevant evidence includes prior treatment during employment and the employer's general attitude towards minority hiring). In the academic context, *see Zahorik*, 729 F.2d at 93 (procedural irregularities and conventional evidence of bias cast doubt on the good faith of decision); Laborde v. Regents of Univ. of Cal., 686 F.2d 715, 717 (9th Cir. 1982) (statistical proof goes to prima facie case); and *Lynn*, 656 F.2d at 1343 (diminished opinion of women's issues and those who concentrate on the study of women's issues is indicative of discriminatory animus).

71. *See Lieberman*, 630 F.2d at 70 (no link between "jocular" remarks by male professors and adverse tenure decision) and *Farlow*, 624 F.2d at 439 (independent evidence of discrimination insufficient in light of plaintiff's failure to prove that she was "qualified" for promotion).

72. *See Zahorik*, 729 F.2d at 95 ("more particularized evidence relating to the individual plaintiffs is necessary to show disparate treatment"); *Laborde*, 686 F.2d at 717 (statistics, though competent to establish prima facie case, do not prove pretext); *Banerjee*, 648 F.2d at 66 (pattern of discrimination is of circumstantial value only; it provides no direct or compelling proof); Davis v. Weidner, 596 F.2d 726, 732 (7th Cir. 1979) (general determinations, though helpful, may not be controlling as an *individual employment decision*); and *Keyes*, 552 F.2d at 580 (mere showing of male-female salary disparities, without departmental breakdown is inconclusive).

causal connection of the challenged employment decision is usually speculative.

In both *Namenwirth*[73] and *Farlow*,[74] the plaintiffs introduced substantial amounts of independent evidence, including histories of discrimination by the schools, prejudicial remarks by decisionmakers, and procedural irregularities.[75] In both cases,[76] the court refused to accord more than marginal weight to such evidence in the absence of any evidence establishing a causal link to the decision itself.[77] Logically, a plaintiff should be able to establish the requisite causal link more easily in the case of procedural irregularities, as these are more clearly connected to the decisionmaking process. However, procedural irregularities are not as expressly indicative of discriminatory animus as are blatantly prejudicial remarks or harassment.[78] Moreover, since the Supreme Court's decision in *Board of Regents v. Roth*,[79] the lower courts have avoided decisions that might impose some standard of procedural fairness on universities.[80]

For the plaintiff to succeed, the procedural irregularity must be singu-

73. 769 F.2d 1325 (7th Cir. 1985).

74. 624 F. Supp. 434 (M.D.N.C. 1985).

75. Namenwith was the first woman on the Zoology Department's tenure track in thirty-five years. She was the only person denied tenure in the history of the department. The university had a marked history of sex discrimination. In 1978, the ratio of tenured women to total tenured faculty, within science departments, was 6 to 323. Namenwirth's only tenured female colleague suffered through fifty years of sexual harassment and discrimination. Adopting an "irregular procedure," the review committee declined to give Namenwirth a recommendation, because the vote, though favorable, was too close. 769 F.2d at 1237.

Farlow introduced evidence that Dr. Tyra, the head of her department, had made sexist remarks to Dr. Joyce Farwell, a female colleague. After Farwell complained about her conditions of employment, Tyra told her that if she was unhappy she could always sell her body. 624 F. Supp. at 438. Tyra also said that Farwell's work "wasn't bad for a broad." *Id.* The court also found that the university had a lax attitude towards the elimination of discrimination, on the basis of their failure to follow their own affirmative action plan. *Id.*

76. The courts respectively found these facts "unusual," 769 F.2d at 1237, and "disturbing," 624 F. Supp. at 438, but similarly inconclusive.

77. In both *Namenwirth* and *Farlow*, the plaintiffs also introduced evidence that similarly qualified male colleagues had received tenure or promotion. Both courts essentially concluded that making fine distinctions with respect to academic qualification was the province of the college not the court.

78. *Namenwirth*, 769 F.2d at 1243.

79. 408 U.S. 564 (1972) (non-tenured faculty member has no due process "property interest" in continued employment).

80. *E.g.*, King v. University of Minn., 774 F.2d at 224, 227 (8th Cir. 1985) (court will not review termination of tenured professor *de novo*, but will only insure he received minimum due process).

larly egregious and must clearly impact the challenged decision. For example, in *Kunda v. Muhlenberg College* the court held that failure to provide adequate counseling concerning a terminal degree requirement was a pretext for discrimination.[81] In *Kunda* the failure to counsel was clearly discriminatory, and not just procedurally unfair, because the college apprised all male candidates of the requirement.[82]

Similarly, in *Greer v. University of Arkansas Board of Trustees* the court found that the university preselected favored male candidates for administrative posts.[83] The court held that this was a charade and a pretext for discrimination.[84] Furthermore, the plaintiffs introduced substantial evidence of blatant harassment and their own "demonstrably superior" qualifications.[85]

Finally, in *Sweeny v. Board of Trustees of Keene State College* (*Sweeny II*)[86] the court performed an independent assessment of the conflicting views of Sweeny's qualifications. The college denied Sweeny a promotion over the favorable recommendation of her departmental colleagues, many of whom testified in her behalf at trial.[87] The court did not, how-

81. 621 F.2d 532 (3d Cir. 1980). The court did not need to reach the issue of Kunda's subjective qualifications, because the college did not argue that she was unqualified in this respect. The college gave lack of the proper degree as the sole reason for plaintiff's termination. *Id.* at 544.

82. In *Kunda*, the college treated similarly situated individuals differently in terms of providing necessary information. This information had a material impact on Kunda's employment status. The school, however, did not violate Title VII by simply failing to provide Kunda with the necessary information. The school violated Title VII because it treated Kunda differently from males subject to the same requirement. *Id. Cf.* Hill v. Nettleton, 455 F. Supp. 514 (D. Colo. 1978) (subsequently imposed degree requirement, not part of original terms of employment, was illegitimate and itself a pretext for discrimination).

83. 544 F. Supp. 1085 (E.D. Ark. 1982), *aff'd sub nom. Behlar v. Smith*, 719 F.2d 950 (5th Cir. 1983).

84. *Id.* at 1102. Unlike typical non-competitive, subjective tenure decisions, the candidates in *Greer* competed for specific administrative posts on the basis of objectively identifiable critieria, such as administrative experience. The court was willing to make comparisons on the basis of these objective criteria. *Greer*, 544 F. Supp. at 1095-98.

85. With respect to Dr. Cornelius, one of the favored male candidates who was particularly unqualified, the court found:

> Dr. Cornelius had little or no supervisory experience. An adequate investigation would have revealed that he had administered a summer youth sports program and that his performance was unsatisfactory . . . so unsatisfactory that the Federal Government threatened to withdraw funding if Cornelius continued as director. *Id.* at 1095.

86. 604 F.2d 106 (1st Cir. 1979). In *Sweeney I* the court had held that the college failed to meet its rebuttal burden. 569 F.2d 169 (1st Cir. 1978), *vacated per curiam*, 439 U.S. 24 (1978) (for reconsideration in light of *Furnco*).

87. 604 F.2d at 112-13.

ever, transcend the barrier of presumed evaluator accuracy.[88]

In each of the above cases some unique combination of events or a singularly egregious act contributed to the plaintiff's ultimate success. None of these cases provides a model for resolution of more typical academic Title VII suits.[89] In the typical situation, the court must apply a "common sense method"[90] for deriving the truth from the totality of circumstances. The *McDonnell Douglas*[91] approach has proven an inadequate device for this task in the academic context. In addition, a debate currently rages in the circuit courts concerning a plaintiff's right to discovery of potentially crucial evidence.

III. FROM INSTITUTIONAL AUTONOMY TO EVIDENTIARY PRIVILEGE

Liberal discovery is important to the plaintiff when proof of intent is an element of the case.[92] Plaintiffs in academic Title VII suits often seek discovery of peer evaluations and other materials generated during the academic selection process. These materials fall within the broad defini-

88. *Id. Cf.* Flygare, *Implications for the Future of Peer Review in Faculty Personnel Decisions*, 7 J. OF C. & U. L. 100, 105 (1980-81) (colleges and universities should realize that *Sweeney* signals the end of the "hands-off' approach). Since *Sweeney II*, however, the deluge of judicial interference predicted by Flygare has yet to occur. Though the court did find for the plaintiff on facts that would have led most courts to contrary results, *Sweeney II* is still an exceptional case given the cooperation from her colleagues. As such, it fails to provide any real model for future judicial action. *See also* Jepsen v. Florida Bd. of Regents, 754 F.2d 924, 926 (11th Cir. 1985) (after remand for further discovery, the district court found that the university's reasons were "dangerously close to outright admission of sex discrimination"). The Court of Appeals affirmed.

89. *Id.* In *Greer* especially, the situation was unique. Not only did the university "preselect" candidates of "demonstrably inferior" qualification, one of the favored candidates (Cornelius) openly harassed and discriminated against the plaintiff after acquiring the position. Most of all, *Greer* does not speak to the problem of reviewing subjective promotion and tenure decisions. Similarly, a plaintiff cannot always count on her colleagues to testify on her behalf, as in *Sweeney II*. Thus, although *Sweeney II* provides a model for protecting individuals from *administrative* discrimination, it fails to address the problems of peer group discrimination or conflicting evaluations. *Kunda* suggests a useful tool for inferring discrimination, namely that academic decisions are based on evaluation over a long probationary period. During this employment relationship, the employer might treat the plaintiff in a discriminatory manner. If this unfair treatment "materially affects" the plaintiff's employment opportunities, as the failure to provide necessary information did in *Kunda*, the court should infer discrimination. Unlike other forms of direct evidence, material unfair treatment is causally connected to the outcome of the employment decision.

90. *Furnco, supra* note 38.

91. 411 U.S. 792 (1973).

92. Rollins v. Farris, 39 F.E.P. 1102, 1105 (E.D. Ark. 1985) (citations omitted). Liberal discovery is important because direct proof of intent is rarely available and the plaintiff will have to rely on the totality of facts to raise an inference.

tion of relevancy under the Federal Rules of Evidence. Under the Federal Rules of Civil Procedure, a party may obtain discovery of any relevant, non-privileged information.[93] Circuit courts have split over recognition of some form of academic non-disclosure privilege.[94]

Universities traditionally maintain confidentiality with respect to hiring decisions. They are reluctant to reveal the identities and votes of those who evaluated the plaintiff (hereinafter "votes") or to provide the files of other candidates who may be similarly situated (hereinafter "comparison files").[95] Universities assert a privilege based on academic freedom. They argue that disclosure of the above materials would have a chilling effect on free and open deliberation of a candidate's qualifications, impairing frank and candid discussion necessary to faculty selection.[96] Universities also contend that disgruntled minority candidates might abuse liberal discovery and conduct fishing expeditions[97] for evidence of discrimination.

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93. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. FED. R. EVID. 401. Parties may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action . . . . FED. R. CIV. P. 26(b)(1) (emphasis added).

94. Except as otherwise provided by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, state, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience. FED. R. EVID. 501.

Traditionally, the law recognizes privileges only in very narrow circumstances when "certain societal values are more important than the ascertainment of truth." *Rollins*, 39 F.E.P. at 1105. *See* 8 WIGMORE ON EVIDENCE §§ 2191 & 2196 (McNaughton rev. 1961) (society has a right to every man's evidence).

95. From the plaintiff's perspective this material is particularly probative, as it permits her to establish the requisite causal connection between other evidence and the decision. On the causal connection requirement, see *Burdine*, 450 U.S. at 256 (plaintiff must show that she was the victim of discrimination) and *supra* note 44. On the importance of comparison evidence, see *supra* note 43. Universities, on the other hand, find these materials particularly sensitive, arguing that peer evaluation requires an atmosphere of confidentiality. They contend that discovery directed at evaluators as individuals will have a "chilling effect" on candid evaluation. *See* Hill and Hill, *Rollback of Confidentiality, supra* note 20 (discussing conflict between plaintiff's need for evidence and university interest in confidentiality and integrity of review process).

96. *Accord*, Hill and Hill, *Rollback of Confidentiality, supra* note 20 (close relationship between peer review and academic excellence) and Note, *Academic Freedom Privilege*, 69 CAL. L. REV. 1538 (1981).

97. *See* E.E.O.C. v. Franklin & Marshall College, 775 F.2d 110, 119 (3d Cir. 1985) (Aldisert, C.J., dissenting) (criticizing majority for authorizing fishing expeditions) and E.E.O.C. v. University of Notre Dame du lac, 715 F.2d 331 (7th Cir. 1983) (exploratory searches will not be condoned).

A. "Posted: No Fishing Allowed"

No court has held academic freedom conveys an absolute non-disclosure privilege, although several circuits have recognized a qualified academic non-disclosure privilege.[98] Functionally, the qualified privilege raises a rebuttable presumption in favor of non-disclosure. To overcome this presumption, the plaintiff must demonstrate a need for the evidence on the basis of the facts and circumstances of the particular case.[99] Though some courts also refer to this as a "balancing approach,"[100] the case-by-case approach is characteristic of qualified privilege. Qualified privilege courts typically assume that liberal discovery would adversely impact the tenure process.[101]

The Fourth Circuit Court of Appeals articulated a test for discovery based on the defendant's proffered explanation for the employment decision in *Keyes v. Lenoir Rhyne College*.[102] The court refused to compel disclosure because the college had not relied on the materials sought by

98. The Seventh Circuit, in *Notre Dame*, is the only court to expressly recognize a "qualified academic privilege." 715 F.2d at 337. Other courts, however, have approaches that are functionally similar under the rubric of a "balancing approach."

99. This case-by-case balancing approach implicitly recognizes the need to steer between two extremes. On the one hand, these courts do not wish to compel disclosure of otherwise confidential material on a routine basis or merely because someone has filed a law suit. On the other hand, refusal to afford an absolute privilege, recognizes that in some cases the plaintiff has a legitimate need for this evidence. The common law also resorts to a balancing approach to determine the existence of a privilege. 8 WIGMORE §§ 2191-96. Courts balance the plaintiff's need for evidence (society's interest in the search for truth) against the defendant's interest in maintaining confidentiality (based on the societal importance of the interest affected).

100. Gray v. Board of Higher Educ., City of New York, 692 F.2d 901 (2d Cir. 1982); Lynn v. Regents of Univ. of Cal., 656 F.2d 1337 (9th Cir. 1981); Jepsen v. Florida Bd. of Regents, 610 F.2d 1379 (5th Cir. 1980), *aff'd on merits after remand*, 754 F.2d 294 (11th Cir. 1985); and Keyes v. Lenoir Rhyne College, 552 F.2d 579 (4th Cir. 1977). *See also* E.E.O.C. Franklin & Marshall College, 775 F.2d 110 (3d Cir. 1985) (Aldisert, C.J., dissenting).

101. This assumption is the critical distinction between courts that do and courts that do not recognize some form of academic privilege. Acceptance of the fact that discovery as a matter of course would adversely impact the tenure process provides the justification for a case-by-case approach. *See supra* note 98.

102. 552 F.2d 579 (4th Cir. 1977). In *Keyes* the court looked to the reasons articulated by the defendant under the second step of *McDonnell Douglas*. The college did not offer reasons such as specific deficiencies in evaluations, that might implicate the confidential portion of the decisionmaking process. The court's conclusion that these materials were not discoverable under the circumstances seems predicated upon a narrowed definition of relevancy. The court in *Jepsen* used the *Keyes* rationale to reach an opposite result, stating:

> We find this reasoning to be persuasive where, as here, the university defends a claim of discrimination on the ground that promotional decisions were based solely on unbiased faculty evaluations which involved criteria unrelated to sex. 610 F.2d at 1384.

the plaintiff to justify its actions.[103] The court concluded that if the materials were not relevant to the employment decision, they were likewise irrelevant as proof of pretext. Likewise, in *Equal Employment Opportunity Commission v. University of Notre Dame*, the Seventh Circuit Court of Appeals held that a plaintiff must exhaust all other available sources of evidence before seeking confidential materials.[104]

Many courts differentiate between votes and comparison files, and other confidential materials, and impose additional requirements before compelling disclosure of the former. The court in *Notre Dame* stated that disclosure of votes and comparison files only would occur under the most limited circumstances.[105] Other circuits have adopted the *Keyes* approach as the test for *initial* discovery, but have expressed different, often conflicting views concerning continued discovery.[106]

For example, the courts in *Gray v. Board of Higher Education, City of New York*[107] and *Lynn v. Regents of the University of California*[108] permitted broad discovery[109] for substantially different reasons. In *Gray*, the school refused to provide the plaintiff with any explanation of its actions against him.[110] The Second Circuit concluded that this deprived the plaintiff of a fair chance to prove his case. Implicitly, the court held that it would compel discovery *only* if a school failed to provide a state-

103. 552 F.2d 479 (4th Cir. 1977).

104. 715 F.2d at 338.

105. *Id.* The Seventh Circuit required a showing of "particularized need" made on a case-by-case basis. *Id.* at 339. The opinion did not indicate how this standard would apply. Other courts have also accepted the view that votes and comparison files are sufficiently unique to warrant special protection. *See, e.g., Franklin & Marshall College*, 775 F.2d at 117 (Aldisert, C.J., dissenting) (broad discovery may compromise legitimate privacy expectations of innocent third parties); and *Gray*, 692 F.2d at 308 (*routine* discovery of tenure votes could chill frank discussion and engender disharmony among faculty). *Contra, Dinnan*, 661 F.2d at 431 (a consequence of decisionmaking responsibility is to stand up and publicly account for one's actions).

106. A Ninth Circuit district court outlined the basic model for step-by-step discovery. Upon a showing of relevancy under the *Keyes-Jepsen* standard, the court will compel initial, limited disclosure, comprised of a written statement of reasons and comprehensive evaluation summaries. The court will only compel further discovery (of votes and comparison files) if the initial disclosures contain evidence substantiating the plaintiff's claim. Zautinsky v. University of Cal., 36 F.R.D.2d 83, 86 (N.D. Cal. 1983).

107. 692 F.2d 901 (2d Cir. 1982).

108. 656 F.2d 1337 (9th Cir. 1981).

109. "Broad discovery" means compelled disclosure of votes and comparison files.

110. 692 F.2d at 907-8. The court relied in part on an A.A.U.P. policy, providing for a statement of reasons explaining any denial of tenure. The court concluded that the plaintiff needed at least some foothold, if he was to have a fair opportunity to pursue his claim. The court clearly focused on that half of the balancing equation relating to the plaintiff's evidentiary needs. *Id.*

ment of reasons.[111]

In *Lynn* the Ninth Circuit relied, in part, on the fact that the university had provided detailed summaries of the evaluations of the plaintiff. The court concluded that this undermined the university's interest in continued confidentiality.[112] In both cases, the courts balanced the plaintiff's need for the materials against the school's interest in confidentiality.

B. A License to Fish; No License to Discriminate

The Fifth Court abandoned the qualified privilege approach in *In re Dinnan*[113] and affirmed a lower court decision ordering Dinnan to reveal the vote he cast in a tenure decision. The court stated that academic freedom did not encompass a privilege to conceal evidence of discrimination.[114] The Third Circuit followed *Dinnan* in *Equal Employment Opportunity Commission v. Franklin & Marshall College,*[115] and ordered the enforcement of a broad Commission subpoena.[116] In *Rollins v. Farris* an Eighth Circuit district court held that any university interest in confidentiality was marginal compared to the plaintiff's right to secure non-discriminatory treatment under Title VII.[117]

According to the above cases the effects of disclosure on the peer review process were insignificant. These liberal discovery courts also emphasized the Congressional mandate in Title VII[118] and resolved the

111. *Id.*

112. The university provided detailed summaries as a matter of course. 692 F.2d at 1348. Presumably, the court analogized this to a waiver of privilege. The court clearly focused on that half of the balancing equation relating to the university's interest in continued confidentiality. The *Lynn* holding is more troubling than *Gray* as a model for future decisions, because the court, in effect, penalized the defendant for providing a benefit to the plaintiff.

113. 661 F.2d 426 (5th Cir. 1981).

114. The court distinguished the *Sweezy* line of cases on the grounds that *Dinnan* did not involve government efforts to suppress ideas. Finding no basis in the law for Dinnan's asserted privilege, the court did not consider a case-by-case balance of interests. *Id.* at 431. The court also discounted the possibility of harm to the peer review process. *Id.* at 431.

115. 775 F.2d 110 (3d Cir. 1985). *See also* E.E.O.C. v. University of N.M., Albuquerque, 504 F.2d 1296, 1302 (10th Cir. 1974) (upholding broad E.E.O.C. subpoena powers; "all that is now required is that the investigation be for a lawfully authorized purpose").

116. "Congress has made clear that the scope of the E.E.O.C.'s subpoena power is limited by the standard of relevance. . . . The E.E.O.C. is not limited, as the appellant appears to suggest, to that which might be relevant to trial. Rather, the E.E.O.C. is entitled to all that is relevant to the charge under investigation." 775 F.2d at 115, *citing*, E.E.O.C. v. Shell Oil Co., 446 U.S. 54 (1984).

117. 39 F.E.P. 1102, 1105 (E.D. Ark. 1985).

118. *See Dinnan*, 661 F.2d at 431 ("appellant is frustrating the appellee's attempt to vindicate an alleged infringement of her statutory and constitutional rights").

discovery issue without regard to particular facts of each case.[119] The plaintiff can, therefore, rely on the recognized need for liberal discovery for cases involving proof of intent and the broad provisions in the Federal Rules.[120] Liberal discovery courts also point to the absence of any expression of Congressional intent to accord special treatment to academic institutions.

IV. REDEFINING AN ACADEMIC QUALIFIED NON-DISCLOSURE RULE

The touchstone of any evidentiary burden is the extent to which the evidence contributes to the search for truth. Society, however, has a corresponding responsibility to insure that the duty to provide evidence is not unnecessarily onerous.[121] Liberal discovery courts distort the balancing process, by minimizing the potential harmful effects of disclosure on the tenure process. The disclosure of votes and comparison files transcends purely institutional concerns, and threatens the interests of individual evaluators and other candidates.[122]

Arguments relying on Congressional intent are equally unpersuasive. As Chief Judge Aldisert noted, dissenting in *Franklin & Marshall College*, arguments based on what is *not* in the Congressional record are tenuous at best.[123] The mandate to enforce Title VII against academic institutions did not, of its own force, prohibit courts from adopting procedures that protect the interests of potential defendants.

Some form of qualified privilege would strike a balance which accords

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119. Liberal discovery courts do perform a balancing of sorts, using the same factors as privilege courts. While privilege courts resolve the issue as a question of fact, according to the circumstances of each case, liberal discovery courts have concluded, as a matter of law, that there is no justification for inhibiting discovery in this context. *See Dinnan*, 661 F.2d at 431 (relying on statutory Title VII mandate and lack of any legal basis for privilege).

120. *See supra* notes 93-94.

121. 8 WIGMORE §§ 2191, 2196.

122. *Supra* note 105. The harm to the peer review process is not illusory simply because it is speculative. Of course, in this respect, defendants are in the same position as the plaintiff, who is unable to prove pretext, because of her inability to carry an unrealistic burden of proof. Defendants as proponents of the privilege, simply lack the ability to quantify the harm and carry their burden of proof.

123. 775 F.2d at 119-20. Chief Judge Aldisert stated:

> Such an approach requires us to decide if Congress in fact intended uncontrolled intrusion into the right of privacy and confidentiality implicated in the tenure review of innocent third parties. It seems unlikely . . . Congressional intent to eliminate employment discrimination can be fully served without conferring on the E.E.O.C. such absolute and unyielding investigatory powers to embark upon a fishing expedition into confidential materials.

Id. at 120.

weight to the legitimacy of both interests. A qualified privilege permits a case-by-case analysis, and avoids an absolute solution that necessarily elevates permanently one set of interests over the other. The current qualified privilege approaches, however, employ irrelevant and unnecessarily burdensome standards.

First, a test for discovery based on the defendant's articulated explanation permits the alleged discriminator to control the course of discovery.[124] A test for continued discovery based on the contents of initial disclosures is flawed in the same respect. Moreover, the disclosed materials are of minimum probative value if offered piecemeal.[125]

A discovery standard based on the plaintiff's ability to meet a certain burden of proof using non-confidential evidence would remove these deficiencies. A standard based on the plaintiff's ability to substantiate her claim also would preclude groundless searches for evidence of discrimination.[126] The suggested approach can protect schools from unwarranted judicial interference in the selection process. Once the plaintiff raises a reasonable inference that the challenged decision rests on discriminatory, rather than on academic grounds, the school loses its basis for asserting a privilege.[127] Society's interest in resolving a now clearly legitimate dispute then predominates.

At this point, the court should compel liberal discovery and full disclosure of all materials, including votes and comparison files. Liberal discovery is essential, because the plaintiff must rely on "the totality of facts" to prove intent. Selected bits of information have minimal probative value with respect to circumstantial proof of intent. Moreover, step-by-step discovery burdens the judicial process, detracts from resolution of the ultimate issues, and forces the plaintiff with a legitimate claim to play a shell game for evidence.[128]

Unfortunately, the benefits of liberal discovery are largely illusory in

124. *See supra* notes 104-112 and accompanying text. The cited cases rely on either the content of the defendant's articulated reasons, his failure to articulate reasons, or his over-articulation of reasons. All of these are within the exclusive control of and subject to manipulation by the defendant.

125. *See supra* note 91. Circumstantial proof of intent depends upon the totality of facts.

126. *See supra* note 99. Groundless, vague investigations and routine intervention pose the greatest threat to academic freedom. *Accord, Sweezy*, 354 U.S. 234.

127. *Rollins*, 39 F.E.P. at 1105.

128. For courts imposing some form of step-by-step discovery, *see Notre Dame*, 715 F.2d 331 (particularized need); *Gray*, 692 F.2d 902 (failure to state reasons); *Lynn*, 656 F.2d 1337 (overstatement of reasons); and *Zautinsky*, 36 F.R.S.2d 83 (contempt of reasons). *See also Jepsen*, 610 F.2d 1379 (no step-by-step).

the face of judicial refusal to provide meaningful review of this evidence. In this respect, at least, disclosure imposes an unnecessary burden on universities. Courts, therefore, need to develop some different mechanism for analyzing academic Title VII suits, and coordinate this method with the availability of discovery. Part V of this Note suggests such an alternative mechanism, discusses its relationship to discovery, and considers the appropriate burden of proof for obtaining discovery.

V. AN EFFORT TO STRIKE A MORE EQUITABLE BALANCE

Courts state that under the *McDonnell Douglas* approach neither the prima facie case nor the rebuttal burden is onerous.[129] Light preliminary burdens serve to clarify the issues in non-academic disparate treatment suits.[130] Academic suits, however, require the preliminary disposition of more substantive issues—a task for which light burdens are inadequate. The courts have never fully resolved the issue of whether judicial interference in the academic selection process is warranted. Instead, they have conferred a *de facto* immunity upon academic institutions by means of the irrebuttable presumption of evaluator accuracy. Judges have been asking the wrong question. The question is not "whether" but "when" should courts interfere in the academic selection process.

This Note suggests that courts simply confront the issue directly on a case-by-case basis by means of more substantial preliminary burdens.

129. *Burdine*, 450 U.S. at 254.

130. "Placing the burden of production on the defendant thus serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issues with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." *Id.* at 256. The three reasons offered to justify imposing a burden of "mere articulation" are inapposite to the academic context, largely because of the subjective nature of academic employment decisions. Even "clear and reasonably specific" reasons are difficult to challenge if expressed in conclusory, subjective terms. Second, the defendant in an academic Title VII case has little incentive to "convince" the court of the legality of his reasons. On the contrary, he has an incentive to choose the most legally defensible reason, regardless of its truth or falsity. With respect to academia, courts are less likely to question some reasons as opposed to others. A decision purporting to rest squarely on peer evaluations is virtually unassailable. *See, e.g., Namenwirth*, 769 F.2d 1235; *Zahorik*, 729 F.2d 85; and *Farlow*, 624 F. Supp. 434. In all three cases the courts ultimately deferred to the expertise of academic evaluators, despite considerable evidence of discrimination.

Finally, "liberal methods of discovery" will not necessarily be available. From the university's perspective the "ideal defense" is that the plaintiff, though "qualified" fails to fulfill the needs of the school or is "out of step with the mission of the department." *See Banerjee*, 648 F.2d 61, and *Smith*, 632 F.2d 316. First, this defense is difficult to refute. Second, because the defense does not rely on the contents of peer evaluations, the university is not subject to discovery under the *Keyes-Jepsen* approach. Finally, like other matters within the defendant's exclusive control, this defense is easily manipulated.

The problem is not the presumed accuracy of academic evaluators, but rather the tacit irrebuttability of this presumption. The *McDonnell Douglas*[131] approach is inadequate.

This Note suggests the following procedure. The plaintiff should bear the initial burden of establishing the prima facie case of discrimination, but the burden would be substantially higher than under *McDonnell Douglas*.[132] If the plaintiff meets this burden, the court would compel discovery according to the method described in Part IV of this Note.[133] At this point, the court has determined that judicial intervention is proper.

In the second step, the plaintiff has the burden of showing that discrimination stands in equal probability with the defendant's stated reasons as an explanation of the challenged decision. If the plaintiff meets this second burden, the burden shifts to the defendant to persuade the court that the decision was legitimate and non-discriminatory.[134]

In order to meet the initial burden and establish a prima facie case, the

131. 411 U.S. 792.

132. *Id. See supra* note 39 (outlining elements of prima facie case). *See also supra* note 129 (despite non-onerous prima facie case burden, plaintiff can rarely prove pretext). Even under a heightened prima facie case standard, the plaintiff would not have to "prove that she was qualified." *See supra* note 62. The precise standard is difficult to articulate, because it would have to rest on an inquiry into the facts and circumstances of each case. The following is a suggestion:

(1) The inquiry would focus on the propriety of judicial intervention. The court would ask the central question, "does the plaintiff's evidence raise a substantial inference of discrimination, that outweighs the defendant's interest in maintaining confidentiality and feedom from routine judicial intervention?"

Functionally, this would operate in a manner analogous to the business judgment rule, another area where society prefers that experts rather than courts routinely run things. The inquiry itself would be different of course.

(2) The plaintiff should have to prove by a preponderance of the evidence:
   a. that at least some actors in the decisionmaking process harbor discriminatory animus;
   b. that she herself was differentially treated or victimized in "some respect," though not necessarily in a manner linked to the decisionmaking process.

(3) The plaintiff would have to show that a genuine dispute exists as to:
   a. whether she is qualified;
   b. whether she can show a causal connection between inferences of discrimination and the adverse decision.

133. *Supra* notes 126-28 and accompanying text.

134. *See supra* note 36 and accompanying text. Given the *Burdine-Sweezy-Furnco* trilogy, the Supreme Court must take the initiative. Other commentators have advocated either shifting the burden of persuasion upon establishment of a *McDonnell Douglas* prima facie case or applying the disparate impact test. *See* Young, *Sex Discrimination, supra* note 2; Cooper, *Barriers, supra* note 2; Stacy and Holland, *Statistical Problems, supra* note 5; and Bartholet, *Jobs in High Places, supra* note 5. This Note foresees the necessity of shifting the burden of persuasion at some point. Shifting the burden is the price for retaining the subjective decisionmaking process.

plaintiff would have to turn to a new type of evidence. This evidence consists of procedural irregularities and differential treatment that directly impaired the plaintiff's scholarly development. Such evidence is currently available and could be exploited more fully even under the existing approach.[135] As a corollary, courts would have to be more receptive to arguments based on procedural irregularities.[136]

To meet the prima facie case burden the plaintiff would first have to demonstrate that she was arguably qualified—that is, that her qualifications were at least a debatable proposition. Second, she would have to show that she suffered from some form of discriminatory or differential treatment, regardless of the connection to the decisionmaking process. Third, she would have to show a pattern of disparate effects or a history of discrimination with respect to the defendant's employment results. Finally, she would have to raise an inference of a causal relationship with the challenged decision by evidence of procedural irregularities and material mistreatment.

In order to shift the full burden of proof to the defendant, the plaintiff must satisfy a burden just short of proving pretext. Under this approach, the burden of proof is the defendant's in close cases, such as *Namenwirth* and *Farlow*. These two cases provide the best illustration of the precise burden that the plaintiff would have to meet.

The same arguments supporting judicial restraint justify shifting the burden of proof in this manner. If judges truly lack the expertise necessary to evaluate academic qualifications, the burden should fall on the party having the requisite expertise, once the plaintiff has shown that discrimination is an equally probable explanation for the challenged decision. The substantial preliminary burdens should adequately protect decisions made "on academic grounds" and prevent routine judicial intervention. While the plaintiff's burdens are substantial, they are not insurmountable. The victim of discrimination has a realistic opportunity

135. Material mistreatment would include conduct occurring during the probationary period which would tend to deny plaintiff information, opportunities for development or recognition, or an equal degree of participation in scholarly activities. Mistreatment alone, however, would be insufficient. Courts should not impose abstract standards of fairness. The plaintiff would have to show that traditionally favored candidates received the benefits which she did not. Examples include disparate teaching assignments or feedback on different candidates' work—in other words, conduct that might cause a deficiency impacting the blend of qualifications observed by unbiased evaluators.

136. *See Kunda, supra* notes 80-81. As with material mistreatment, the court would focus upon comparing the procedural treatment of different candidates, not on whether the procedures met some abstract standard of fairness.

to obtain meaningful review of her claim. This approach, though complex, recognizes the legitimacy of both the plaintiff's and the defendant's interests, as well as the unique and complex nature of academic employment.

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